

STATE OF MICHIGAN
COURT OF APPEALS

RUSSIAN AMERICAN ASSOCIATION OF
DETROIT, by its Assignee, the Estate of Kazimerz
Kosecki, Deceased,

UNPUBLISHED
April 6, 1999

Plaintiff-Appellant,

v

HASTINGS MUTUAL INSURANCE COMPANY
and WILLIAM P. ADDIS AGENCY, INC.,

No. 206086
Oakland Circuit Court
LC No. 96-532482 CK

Defendants-Appellees.

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Separate orders granting summary disposition were entered in favor of defendants on plaintiff's complaint. Plaintiff's subsequent motion for relief from judgment was denied, and plaintiff appeals from the orders as of right. We affirm.

For approximately twenty years, defendants provided general liability insurance for plaintiff's recreational facility. On August 14, 1994, Kazimerz Kosecki drowned after the rowboat he rented from plaintiff capsized and sank. Kosecki's estate sued plaintiff for negligence, and Hastings refused to defend or indemnify plaintiff because its policy contained a watercraft exclusion clause. Plaintiff thereafter settled with Kosecki's estate and assigned all claims it might have against defendants to Kosecki's estate. This action was then filed seeking declaratory relief against defendant Hastings and alternatively, alleging negligence against defendant Addis Agency for failing to inform plaintiff that it was not insured for boating accidents, such as the one that claimed Kosecki's life.

Plaintiff first argues that the trial court erred by granting summary disposition to defendant Hastings based on a determination that the occurrence, which led to Kosecki's death, was excluded under the terms of the policy. A trial court's grant of summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for the claim. *Id.* A motion for

summary disposition is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

The policy in this case covers "bodily injury" caused by an "occurrence." "Occurrence" is defined within the policy as "an accident." The policy further contains an exclusionary clause, which provides:

This insurance does not apply to:

(g) "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto", or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading and unloading."

The exclusion did not apply to watercraft while on shore.

To determine whether a policy provides coverage, a court first determines whether the policy is "clear and unambiguous on its face." *Farm Bureau Mutual Ins Co v Blood*, 230 Mich App 58, 61; 583 NW2d 476 (1998). In determining whether an insurance policy is clear and unambiguous on its face, the insurance contract should be read and interpreted as a whole. *Id.* "An insurance contract is clear if it fairly admits of but one interpretation." *Id.* "An insurance contract is ambiguous if, after reading the entire contract, its language reasonably can be understood in differing ways." *Id.* at 61-62. Policy terms are interpreted according to policy definitions where applicable, and if a policy fails to define a term, that term is given a meaning in accordance with its common usage. *Cavalier Mfg Co v Wausau (On Remand)*, 222 Mich App 89, 94; 564 NW2d 68 (1997). Dictionary definitions may be used to establish the meanings. *Fitch v State Farm*, 211 Mich App 468, 472; 536 NW2d 273 (1995). Where there is no ambiguity, the policy must be enforced as written, in accordance with its terms. *ACIA v Hardiman*, 228 Mich App 470, 473-474; 579 NW2d 115 (1998). Technical and strained constructions of the policy language should be avoided. *Fitch, supra*.

The insurance policy in this case is not unclear or ambiguous. The language cannot reasonably be understood in different ways.

Under the policy, "occurrence" is defined as "an accident". Where, as here, "accident" is not defined in the policy, the word "accident" means "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Group Ins Co v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992), citing *Guerdon Industries, Inc v Fidelity & Casualty Co*, 371 Mich 12, 18-19; 123 NW2d 143 (1963). Plaintiff argues that the "occurrence" in this case was not the capsizing of the rowboat and subsequent drowning, but rather was the actual rental of the unsafe rowboat. Although plaintiff may have been negligent in failing to provide a safe boat, that act was not an accident. Therefore, rental of the unsafe boat was not an occurrence, which would trigger coverage under the policy. The only "occurrence" in this case was the accidental capsizing of the rowboat on the water.

The trial court correctly determined that the accidental capsizing of the rowboat, and subsequent drowning, were excluded from coverage by the watercraft exclusion. The exclusion precluded recovery for bodily injury arising out of the use of the rowboat. Here the drowning arose out of the accidental capsizing of the rowboat. We also note that the exclusion is not ambiguous simply because the term "watercraft" is not defined within the policy. See *Czopek, supra* at 596, where the Court stated that if a term has a common meaning, failure to define it within a policy does not render the policy ambiguous. The dictionary definition of "watercraft" is "a boat or ship." A "boat" is "a vessel for transport by water, propelled by rowing, sails, or a motor." *Random House Webster's College Dictionary*, (1997). A rowboat is clearly a watercraft within the common definition of that term.

Applying the policy language as written, summary disposition was proper. The occurrence was excluded from coverage by the clear, unambiguous language of the exclusion.

Plaintiff next argues that the trial court erred in granting summary disposition to defendant Addis Agency. Plaintiff argues that it reasonably relied on the insurance agent's expertise to obtain proper insurance coverage, and it reasonably expected that coverage would include injuries from boating accidents. Without citing to any applicable authority, plaintiff asserts that Addis Agency should have inquired about plaintiff's facility and activities and then procured the necessary coverage. Plaintiff argues that the duty arose simply because of a long term relationship between it and Addis Agency, and because plaintiff relied on Addis Agency's expertise. Plaintiff's argument has no merit.

Generally, insurance agents have no affirmative duty to advise clients on the adequacy of their policy's coverage. *Mate v Wolverine Mutual Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 201125, dec'd 12/1/98), slip op at 5, citing *Bruner v League Gen'l Ins Co*, 164 Mich App 28, 34; 416 NW2d 318 (1987). Instead, an insured has an obligation to read its insurance policy and to raise any questions regarding coverage within a reasonable time after the policy is issued. *Mate, supra*. Only in some circumstances, specifically where a "special relationship" exists between an insurer and an insured, will the insurer have a duty to advise the insured regarding the adequacy of coverage. *Bruner, supra*. A special relationship exists where the insured and insurer are in a long-standing relationship and there is "some type of interaction on a question of coverage, with the insured relying on the expertise of the insurance agent to the insured's detriment." *Id.* For example, in *Bruner*, this Court explained that there might have been a question of fact as to the existence of a special relationship if the plaintiffs *had inquired about underinsured motorist coverage and had not been told about the nature and cost of the coverage, or had been advised against adding the coverage.* *Id.* An allegation that plaintiffs had placed their total trust in the insurer to determine what was appropriate coverage for them was insufficient to give rise to the duty. *Id.*

In this case, plaintiff only claims that it relied on defendant Addis Agency, and reasonably expected the coverage to include boating accidents. There is no allegation or evidence that plaintiff had any interaction with Addis Agency regarding specific coverage for boating accidents that occurred on the water. Plaintiff never inquired about such coverage. Thus, even though plaintiff had a significantly long relationship with Addis Agency, there were no facts to support the existence of a "special relationship" between them, which would give rise to a duty on the part of Addis Agency to advise

plaintiff about the adequacy of its coverage with regard to boating. The trial court did not err in granting summary disposition to defendant Addis Agency on plaintiff's negligence theory¹.

We also note that in certain circumstances, a defendant may be equitably estopped from denying coverage even though the express terms of the policy do not include coverage. *Mate, supra* at 4. The doctrine of equitable estoppel only applies, however, if a defendant "induces another to believe certain facts to exist and such other rightfully relies and acts on such belief," either intentionally or through culpable negligence. *Id.* In the instant case, equitable estoppel does not apply. While plaintiff may have assumed boating accidents were covered, there is no evidence that either defendant induced or led plaintiff to believe that such coverage existed. We disagree that the mere mention of the words "beach" and "bathing" in the liability classification section of the policy, coupled with the fact that Hastings had inspected the facility and was apparently aware that there were rowboats, is sufficient to lead to a conclusion that defendants induced plaintiff to believe that boating accidents were covered. The words "beach" and "bathing" do not mean, infer, relate to, imply, or translate to the word "boating." If anything, the absence of the word "boating" in the description of the facility and the policy endorsements should have caused plaintiff to read its policy to determine the scope of its coverage, which it undisputedly did not do. Moreover, it is illogical for plaintiff to argue that it believed, and was induced to believe, that it was covered for boating accidents because Hastings inspected its premises in relation to a fire liability report and noted the presence of rowboats in the report.

Finally, plaintiff argues that the trial court erred in denying its motion for relief from judgment based on newly discovered evidence. This Court reviews a trial court's denial of a motion for relief from judgment for an abuse of discretion. *Redding v Redding*, 214 Mich App 639, 643; 543 NW2d 75 (1996). MCR 2.612(C) provides that a court may relieve a party from a final judgment or order on the basis of newly discovered evidence that could not have been produced by the exercise of due diligence in time to move for a new trial. In order for new evidence to support relief from judgment, a plaintiff must show that "(1) the evidence is newly discovered, not merely its materiality; (2) the evidence is not merely cumulative; (3) it is likely to change the result; and (4) the moving party could not have produced it with reasonable diligence." *Hauser v Roma's of Mich*, 156 Mich App 102, 106; 401 NW2d 630 (1986).

The newly discovered evidence in this case, specifically documents that establish that Hastings was aware that plaintiff had rowboats on its property, would not have changed the outcome of either summary disposition motion. Even if Hastings knew about the rowboats, there was no special relationship, which would have obligated Hastings to advise plaintiff regarding the adequacy of its coverage. The evidence also would not have changed the conclusion that Hastings did not have a contractual duty to defend or indemnify plaintiff where the watercraft exclusion applied.

With regard to Addis Agency, the new evidence did not establish that Addis knew about the rowboats, or that there was a special relationship, which would have given rise to a duty to advise plaintiff regarding the adequacy of plaintiff's coverage. Moreover, the trial court had the new evidence in front of it when it decided defendant Addis Agency's motion. Plaintiff attached the evidence to a supplemental brief prior to oral argument and referred to the evidence at oral argument. The evidence had no bearing on the ultimate conclusions in the case.

We also note that the trial court properly determined that plaintiff failed to demonstrate that it could not have produced the evidence earlier. Plaintiff suggested that Hastings deliberately or negligently withheld certain documents, the "newly discovered evidence", under a previous discovery request. That discovery request, however, was not produced in the trial court nor was it in the trial court file². Thus, no determination regarding whether defendant Hastings wrongfully withheld documents could be made, and plaintiff's claim that it had used due diligence was unsupported.

Affirmed.

/s/ Janet T. Neff

/s/ Michael J. Kelly

/s/ Harold Hood

¹ We also note that the two cases, which plaintiff cites in support of this theory are from other jurisdictions, and are inapposite to the case at bar. In *Riddle-Duckworth, Inc v Sullivan*, 253 SC 411; 171 SE2d 486 (1969), the plaintiff not only requested insurance coverage for its elevator, but read its policy, and questioned whether such coverage actually existed. It was informed by the defendant that there was coverage for the elevator. In *Roberson v Knupp Ins Agency*, 125 Ill App 2d 373; 260 NE2d 849 (1970), there was evidence that a discussion about specific insurance occurred; and that assurances were made to the effect that the requested insurance would be obtained and that the logging and lumbering operation would be covered. Here, plaintiff never requested insurance coverage for boating operations and never discussed such coverage with either defendant.

² On appeal, plaintiff attaches a copy of the earlier discovery request, exhibit 11. This exhibit constitutes an expansion of the record. It is impermissible to expand the record on appeal. *Trail Clinic, PC v Bloch*, 114 Mich App 700, 713; 319 NW2d 638 (1982).